Supreme Court, U.S.
FILED
DEC 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-575

IN THE

Supreme Court of the United States

October Term, 1989

JOHN J. HARTER,

Petitioner,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

PETITIONER'S REPLY

Alan Raywid
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 659-9750

Attorney for Petitioner

December 21, 1989

CASELAW PRESS INC. – 1717 K STREET NW WASHINGTON DC 20006 – 223-1220

IN THE

Supreme Court of the United States

October Term, 1989

No. 89-575

JOHN J. HARTER,

Petitioner,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

PETITIONER'S REPLY

While Respondents concede the major elements of Petitioner's argument — promotions by selection board and grievances before the Foreign Service Grievance Board are statutorily protected — they see no interference with this statutory scheme by the delegation to a "reconstituted selection board" for determination of the ultimate question before a grievance board, challenging the propriety of the selection process. In supporting the use of hearsay evidence for this ultimate question, Respondents overlook the implementing regulations for the conduct of grievance hearings, necessitating this brief reply.

1. Respondents fail to examine and take into account the rules of the grievance board guaranteeing to grievants the right to examine and cross-examine witnesses. The Foreign Service Act established the Foreign Service Grievance Board, assigned *it* exclusive jurisdiction and authority for dealing with the class of grievances here represented, and set out in detail

the hearing procedures to be followed in such cases. The Regulations of the FSGB implementing the statutory provisions require that "[e]ach party shall be entitled to examine and cross-examine witnesses." (22 C.F.R. § 906.8(a). Appendix 251) The procedure utilized by Respondents denied Petitioner that critical right to cross-examine, a recognized element of due process. Instead, the FSGB accepted as its sole evidence the recommendation of the RSB,[1] thus denying to grievant any opportunity to test its fairness, accuracy and validity. At best, this finding was opinion testimony on the ultimate question upon which the Government bore the burden — would the grievant not have been promoted despite the prejudicial evaluation. That issue can hardly be resolved on "hearsay" conclusory evidence without rendering the statutory grievance hearing a sham.

2. Respondents focus their argument on the wide legal latitude bestowed upon the FSGB to receive "any oral or documentary evidence," subject only to restriction that such evidence not be "irrelevant, immaterial, or unduly repetitious." (22 U.S.C. 4136(4), Appendix 237). They imply (Opp. 3, final sentence), that other evidence exists to show that Petitioner would not have been promoted to the Senior Foreign Service in 1983 in the absence of the agency errors Petitioner

[1]Respondents have stated that "Petitioner does not dispute that the RSB mechanism resembles as closely as possible the selection boards that are mandated by the Foreign Service Act of 1980." (Opp. 5) However, the record documents the differences between the relevant 1983 Selection Board that met for three full months to rank the complete performance files of more than five hundred officers at the FS-1 level, whereas the RSB met for less than one day to compare Petitioner's file with the files of an unrepresentative sample of FS-1 officers, all of whom were promoted in 1983. Furthermore, the original panel was publicly announced, under procedures that were negotiated and accepted by the American Foreign Service Association, whereas virtually no one knew of the existence of the RSB until after it had completed its work. Finally, grievant in this process was "red flagged" to the RSB, selected to support an earlier selection board's conclusion.

complained of. In fact, the report of the RSB was not a pre-existing document that had been prepared in the ordinary course of business. It was produced solely for the purpose of this litigation, designed to be conclusive "proof" on the ultimate issue at stake, and prepared at the direction of the parties with an interest in its outcome. Resolution of the ultimate question at issue by delegation to a RSB stretches the hearsay rule beyond reasonable limit.

3. Respondents repeat Petitioner's acknowledgement that there is no conflict with any other court of appeals, yet they abbreviate that acknowledgement omitting that because of the central location of the Department of State there is not likely to be review by any other circuit. Instead, Petitioner's reliance was upon a question of exceptional importance, namely that the Foreign Service Act affects the careers of a significant number of Foreign Service Officers charged with executing the foreign policy of the United States, and that the fundamental guarantees of their employment — objective promotion through selection boards, and review of selection board error through grievance board hearings — is undermined through resort to the findings of a reconstituted selection board.

CONCLUSION

In view of the foregoing, Petitioner prays that this Court grant certiorari.

Respectfully submitted,

Alan Raywid
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 659-9750

Attorney for Petitioner

December 21, 1989